



The Administrative Law Judge awarded claimant a 6.5 percent permanent partial general disability for a September 12, 1995, work injury. Claimant contends she is entitled to a much higher permanent partial general disability award based on a work disability.

Respondent, however, contends claimant only injured her right shoulder and right upper extremity in the September 12, 1995, work accident. Accordingly, respondent argues that claimant's award is limited to permanent partial disability benefits based on a scheduled injury as set forth in K.S.A. 44-510d(a)(13). Additionally, if the Appeals Board finds claimant is eligible for a whole body disability, the respondent contends claimant is limited to functional impairment because she returned to work for the respondent at a comparable wage and then voluntarily quit her employment.

Nature and extent of claimant's disability is the only issue for Appeals Board review.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

#### **FINDINGS OF FACT**

- (1) On the date of claimant's accident, September 12, 1995, claimant had been employed by the respondent since October 1994 as a shuttle truck driver.
- (2) On September 12, 1995, claimant had driven a truck of merchandise from Emporia, Kansas, to Bentonville, Arkansas. While claimant was unloading heavy sacks weighing between 50 and 75 pounds of undeveloped film in Bentonville, Arkansas, she picked up one of the sacks out of the truck and as she turned to place the sack high on a rack, claimant felt a pop at the base of her neck.
- (3) After she felt the pop, claimant felt pain radiate down into her right shoulder and arm.
- (4) Claimant notified the night supervisor in Bentonville of her discomfort. After claimant loaded the truck with developed film, she put ice on the back of her neck.
- (5) Upon claimant's return to Emporia, Kansas, she notified her supervisor of her injury. She was sent by the respondent to the company doctor, Duane A. Ginavan, M.D., located in Emporia, Kansas.
- (6) Dr. Ginavan saw claimant on September 13, 1995, and took her off work. Claimant's right arm was placed in a sling, pain medication was prescribed, and claimant was placed in a physical therapy program.

(7) Because claimant did not improve, Dr. Ginavan referred her to orthopedic surgeon Michael L. Montgomery, M.D. He saw claimant on one occasion on October 13, 1995. Dr. Montgomery injected claimant's right shoulder, but claimant's shoulder discomfort did not improve. The doctor's impression was an impingement syndrome of the right shoulder with no neck involvement.

(8) The respondent then referred claimant to orthopedic surgeon Robert L. Eyster, M.D., in Wichita, Kansas. Dr. Eyster had previously treated claimant in 1985 and had last seen claimant for an evaluation of another injury in 1989.

(9) Claimant injured her low back on July 7, 1985, while employed at a restaurant. Dr. Eyster diagnosed claimant at that time with an L4-5 herniated disc. Because conservative treatment failed to improve claimant's symptoms, on November 15, 1985, Dr. Eyster performed a laminectomy and a discectomy at that level. The doctor released claimant on March 14, 1986, with a 15 percent permanent functional impairment rating. He restricted claimant's activities to no repetitive bending and no lifting over 25 pounds on a repetitive basis.

(10) Claimant reinjured her low back lifting while working at another restaurant on June 5, 1988. She was seen on June 10, 1988, by orthopedic surgeon Michael L. Montgomery, M.D., for a consultation. Dr. Montgomery recommended conservative treatment of bed rest, pain and anti-inflammatory medication, muscle relaxants, and physical therapy. Claimant was released by Dr. Montgomery on September 20, 1988, without restrictions.

(11) Dr. Eyster saw claimant on April 14, 1989, for the June 5, 1988, injury. The doctor opined claimant had suffered a thoracic strain in 1988. The doctor rated claimant with a 16 percent permanent functional impairment with 15 percent attributable to the 1985 injury. Claimant was restricted from repetitive bending and twisting, no repetitive lifting over 30 pounds, single lift limited to 50 pounds, and no prolonged sitting.

(12) Claimant had previously driven an over-the-road semi-truck in the late 70's and early 80's. She completed an 8-week truck driving school in 1990. At claimant's request, she returned to Dr. Eyster on March 11, 1991, and demonstrated to him that she should be released to return to truck driving work with no restrictions.

(13) For the September 12, 1995, injury, the claimant first saw Dr. Eyster on October 25, 1995. The doctor's impression was that claimant had not injured her right shoulder but had referred pain from an injured neck and trapezius muscular irritation. The doctor conducted a posterior foraminal closure test that caused radicular nerve type pain down claimant's right arm and also caused numbness in her right thumb, index, and middle fingers.

(14) Dr. Eyster prescribed exercises and an epidural injection at the C5-6 level. He gave claimant temporary work restrictions of no lifting over 20 pounds, no repetitive lifting over

5 pounds, and no driving over 100 miles. He also referred claimant for possible surgical intervention to neurosurgeon E. O. Abay, II, M.D.

(15) On January 30, 1996, Dr. Abay saw claimant for a neurological consultation. His impression was pain consistent with right C6-7 distribution. The doctor ordered an MRI examination.

(16) The MRI examination showed a minimal central disc bulge at C7-T1, not compromising the spinal canal or neuroforamen. The doctor opined that neurosurgery was not indicated or would not help. The pain was from a soft tissue strain. Dr. Abay recommended further treatment with a rehabilitation physician and then a functional capacity evaluation for release with restrictions.

(17) Respondent's insurance carrier referred claimant for further evaluation and treatment with Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. Dr. Murati saw claimant the first time on March 4, 1996. He recommended right upper extremity nerve conduction studies/EMG.

(18) Dr. Murati found the NCS/EMG study consistent with right carpal tunnel syndrome and mild C7-8 radiculopathy. He placed claimant in a physical therapy program and prescribed medication for claimant's ongoing headaches.

(19) Claimant returned to see Dr. Eyster on May 16, 1996. Dr. Eyster did not attribute the claimant's carpal tunnel syndrome diagnosis to her work. He recommended an injection to treat the carpal tunnel syndrome. At that time, he released the claimant to return to work without restrictions.

(20) Claimant returned to her regular truck driving job sometime between May 16, 1996, and June 6, 1996. Claimant testified she completed the 12-hour shift. But she suffered pain and discomfort in her neck as she turned her head to see traffic. Lifting also caused her pain and discomfort. Furthermore, she suffered from a severe headache because of the work activities. After she completed the 12-hour shift, she notified her supervisor she could not do the job because of the pain and discomfort.

(21) On June 6, 1996, Dr. Eyster saw claimant for the last time. His final diagnosis was cervical strain with at least some temporary or intermittent radiculopathy down her right arm related to the September 12, 1995, injury at work.

For the cervical neck irritation, the doctor assess a 6 percent whole body functional impairment. He referred claimant back to Dr. Murati to assess permanent restrictions in accordance with the August 20, 1996, Functional Capacity Evaluation (FCE).

( 22) After claimant attempted to return to work in early June 1996, she suffered a heart attack on June 16, 1996, that resulted in significant heart damage. Joseph P. Galichia,

M.D., an interventional cardiologist, who was claimant's treating cardiologist for her heart problem, testified and concluded that claimant's heart attack and subsequent four by-pass surgical grafts resulted in claimant being unable to work. The doctor opined claimant was most likely permanently disabled from working for the rest of her life.

(23) Dr. Murati had claimant undergo an FCE on August 20, 1996. He saw claimant for the last time on August 29, 1996. The doctor assessed claimant's permanent functional impairment of 10 percent of the right upper extremity based on her right carpal tunnel release surgery and right shoulder strain. He referred to the FCE results for claimant's permanent work restrictions. The bilateral lifting restrictions below the waist were 40 pounds maximum, 35 pounds occasionally, 25 pounds frequently, and 20 pounds continuously. Lifting above the waist to shoulder was limited to 25 pounds maximum, 20 pounds occasionally, and 15 pounds frequently, and 12 pounds continuously. Lifting above the shoulder was limited to 25 pounds maximum, 20 pounds occasionally, 15 pounds frequently, and none continuously. Unilateral lifting above shoulder was limited to 12.5 pounds maximum, 10 pounds occasionally, 8 pounds frequently, and none continuously. Claimant's tolerance for a full work day was not assessed during the FCE because of claimant's overall poor health condition.

(24) Dr. Murati was shown a work task list for the jobs claimant had performed in 15 years preceding her September 12, 1995, accident. This work task list was completed by vocational expert Karen Terrill at the request of the respondent. Dr. Murati utilized the FCE work restrictions and concluded claimant had lost the ability to perform 2 of the 26 work tasks she had performed before her injury.

(25) At the request of the claimant's attorney on October 16, 1996, Jane K. Drazek, M.D., a board certified physical medicine and rehabilitation physician, evaluated the claimant. She had been provided for review claimant's prior medical treatment records of Dr. Murati, Dr. Eyster, Dr. Montgomery, Dr. Abay, and Dr. Galichia, as well as the FCE.

Her impression was mild disc bulge at C7-T1 and chronic myofascial injury or post tension myositis of the neck. She attributed those conditions to claimant's September 15, 1995, accident.

Dr. Drazek assessed a 5 percent whole body permanent functional impairment for the neck injury and a 3 percent permanent functional impairment of the right upper extremity. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, she combined these ratings resulting in a 7 percent permanent functional impairment to the whole body.

The doctor restricted claimant to an occasional lift of 20 pounds, frequent lift of 10 to 15 pounds, avoid repetitive turning or rotation of the neck, avoid repetitive overhead use of upper extremities, and avoid activities requiring prolonged standing.

Dr. Drazek was shown a list of work tasks the claimant had performed in the 15 years preceding her September 12, 1995, accident. This list was completed at claimant's request by vocational expert Jim Molski. The doctor testified claimant could no longer perform 9 of the 35 work tasks listed based on the permanent work restrictions she placed on claimant. This resulted in a 26 percent work task loss.

(26) Claimant testified she was employed before her accident on a part-time basis working 20 hours a month earning \$6 per hour for ACT Media. After her September 12, 1995, accident and after her heart attack, she remained employed by ACT Media performing mostly clerical paperwork and not performing the heavy lifting of the boxes of coupons she performed before her accident and heart attack.

(27) The only opinion contained in the record on claimant's post-injury ability to earn wages was that of vocational expert Karen Terrill. She found claimant had the ability to work 8 hours per day at \$6 to \$7 per hour.

#### CONCLUSIONS OF LAW

(1) K.S.A. 44-510e(a) defines work disability as the average of the wage loss and work task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

(2) But K.S.A. 44-510e(a) limits a claimant to functional impairment so long as claimant earns a wage equal to 90 percent or more of the pre-injury average weekly wage.

(3) If claimant refused to accept or even attempt to perform reasonably offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. See Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

(4) Even if accommodated work is not offered, claimant must show she made a good faith effort to find employment. If claimant did not make a good faith effort, a wage will be

imputed to the claimant based on evidence in the record as to claimant's earning ability. See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(5) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent the that the work related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to preexisting. See K.S.A. 44-501(c).

(6) The Administrative Law Judge found claimant's testimony coupled with the medical testimony of Dr. Eyster and Dr. Drazek as persuasive that claimant's work-related accident caused injury to both her neck and right shoulder. Thus, the Administrative Law Judge found claimant had sustained a whole body impairment and was not limited to a scheduled right upper extremity injury.

(7) The Appeals Board agrees with the Administrative Law Judge and concludes claimant suffered not only a right shoulder injury but also a neck injury. The Administrative Law Judge, however, limited claimant's entitlement to permanent partial disability benefits based on her functional impairment only. The Appeals Board finds and concludes that claimant is entitled to a work disability because before she suffered a heart attack not associated with her employment, she attempted to return to work for the respondent and could not perform the work because of her work-related injuries. See Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

(8) Before claimant's disabling heart attack, the Appeals Board concludes claimant was not restricted from working full time, 8 hours per day 5 days per week. Taking into consideration Ms. Terrill's opinion that post-injury claimant retained the ability to earn \$6 to \$7 per hour, claimant's actual part-time earnings of \$6 per hour, and claimant's post-injury work restrictions; the Appeals Board concludes that a post-injury wage of \$240 per week (\$6 per hour x 40 hours) should be imputed to claimant in determining the wage loss component of the work disability test. The parties stipulated to a pre-injury gross average weekly wage of \$272.03. Comparing this pre-injury average weekly wage to claimant's imputed \$240 average weekly wage equals an 11.8 percent wage loss.

(9) The Appeals Board concludes the most credible and persuasive work task loss opinion in the record is that of Dr. Drazek. Dr. Murati's opinions are based on the FCE completed after claimant had suffered her disabling heart attack and did not include restrictions associated with claimant's permanent neck injury. Although Dr. Drazek also examined claimant after claimant's disabling heart attack, the Appeals Board finds her permanent work restrictions were based only on claimant's neck and right upper extremity work related injuries and did not include any disability resulting from the heart attack. Thus, the Appeals Board concludes that claimant suffered a work task loss of 26%.

(10) Furthermore, the Appeals Board finds claimant did not have any preexisting work restrictions because Dr. Eyster in 1991 had removed those restrictions. Accordingly,

claimant's work disability is computed by utilizing restrictions related only to the September 12, 1995, accident while employed by the respondent, that resulted in injuries to claimant's right shoulder and neck.

(11) As required by K.S.A. 44-510e(a), claimant's work task loss of 26 percent is averaged with her 11.8 percent wage loss equalling a 19 percent work disability.

(12) The Appeals Board adopts the Administrative Law Judge's finding that claimant's September 9, 1995, accident resulted in a 6.5 percent functional impairment

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Nelsonna Potts Barnes' Award dated March 19, 1998, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Angela Wortham, and against the respondent, Wal-Mart, and its insurance carrier, Claims Management, Inc., for an accidental injury which occurred on September 12, 1995, and based upon an average weekly wage of \$272.03.

Claimant is entitled to 40 weeks of temporary total disability compensation at the rate of \$181.36 per week or \$7,254.40, followed by 74.1 weeks of permanent partial disability compensation at the rate of \$181.36 per week or \$13,438.78 for a 19% permanent partial general disability, making a total award of \$20,693.18.

As of March 20, 1999, the entire award is due and owing in one lump sum less any amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

All remaining orders contained in the award are adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1999.

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BOARD MEMBER



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BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS  
James P. Johnston, Wichita, KS  
Michael D. Streit, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director